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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In Re:

DAVID WILLIAM BARTENWERFER and
KATE MARIE BARTENWERFER

Debtors.

KIERAN BUCKLEY,

Plaintiff,

vs.

DAVID WILLIAM BARTENWERFER and
KATE MARIE BARTENWERFER,

Defendants.

Case No. 13-30827-HLB-7

Chapter 7

Adv. Pro. No. 13-03185-HLB

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

Date: June 4, 2015

Time: 2:00 p.m.

Place: 235 Pine Street, Courtroom 23
San Francisco, CA

Hon. Hannah L. Blumenstiel

INTRODUCTION

Nondischargeability under § 523(a)(2)(A) requires that the debtor make a knowing misrepresentation or nondisclosure of a material fact. The jury in the Superior Court proceedings in this case made no such finding. Rather, the jury found that the Bartenwerfers “should have known” of certain facts, found that Bartenwerfers did not make any knowing misrepresentations, and awarded the plaintiff, Kiernan Buckley, nothing on this claims for intentional fraud. When considering the totality of these facts, the jury’s verdict is plain: the Bartenwerfers did not make a known misrepresentation or nondisclosure. Additionally, Buckley overstates the damages that could

1 be found nondischargeable, has not demonstrated a right to recover attorneys' fees, and offers the
2 irrelevant declaration of Janet Brayer—which the Court should not consider. Hence, the Court
3 should deny Buckley's summary judgment motion.

4 FACTS

5 The Bartenwerfers purchased the real property commonly known at 529 28th Street, San
6 Francisco, California, (the "Property") in February 2005. *Complaint* ¶ 6. Between April 2005 and
7 January 2008, the Bartenwerfers obtained a series of building permits and made improvements to the
8 Property, including the addition of approximately 1,000 square feet of living space. *Id.* On January
9 28, 2008, Buckley—a general contractor—executed an agreement to purchase the Property for \$2.1
10 million. Several addenda to the contract were executed, including delivery of the "3R" report by
11 February 27, 2008, provision for certain repairs requested by Buckley, a \$25,000 holdback to
12 address permit issues, and a further \$10,000 holdback to address heating issues. *Order Granting*
13 *Remitter, et al.* 2:18–24.

14 Escrow closed on March 14, 2008; Buckley agreed to close escrow event though additional
15 repairs were needed. The parties continued to negotiate and a number of repairs were completed, but
16 disagreements between the parties regarding permit issues and other problems resulted in Buckley
17 commencing a lawsuit in the Superior Court. That action, styled *Buckley v. Bartenwerfer*, San
18 Francisco County Superior Court case number CGC-09-489793, (the "State-Court Action")
19 contained causes of action for breach of contract, negligence, negligent misrepresentation,
20 intentional misrepresentation, and seller's failure to disclose information in sale of real estate.
21 Buckley sought general and special damages, interest, attorneys' fees, punitive damages, and
22 rescission of the purchase. *Order Granting Remitter, et al.* 2:18–24.

23 Following a 17-day trial to a jury, the jury found in favor of Buckley on the breach of
24 contract, negligence, and seller's failure to disclose information in sale of real estate claims, and in
25 favor of the Bartenwerfers on the negligent misrepresentation and intentional misrepresentation
26 claims. *Id.* Specifically, the jury found that the Bartenwerfers did not engage in conduct with
27 malice, oppression, or fraud and did not intentionally or negligently misrepresent facts to Buckley:

28 ///

1 CACI VF 1900 - Intentional Misrepresentation

2 12. Did David or Kate Bartenwerfer make one or more false representation[s] of an
3 important fact to Kieran Buckley or his agent?

4 _____ Yes X No

5 ...

6 CACI VF 1903 – Negligent Misrepresentation

7 17. Did David or Kate Bartenwerfer make a false representation of an important fact to
8 Kieran Buckley?

9 _____ Yes X No

10 ...

11 Of the total amount set forth above, how much, if any did you award for intentional fraud.

12 \$ _____ 0

13 ...

14 CACI VF 3900 – Punitive Damages

15 Did Defendant David Bartenwerfer or Kate Bartenwerfer engage in the conduct with malice,
16 oppression, or fraud?

17 _____ Yes X No

18 *Verdict Form* at 5, 7, 13. The jury did find that certain facts were not disclosed to Buckley, but
19 considering the totality of the verdict only found that the Bartenwerfers should have known these
20 facts; not that they knew of the facts. The jury awarded total damages of \$444,671, but the jury did
21 not make any award for alleged fraud or punitive damages. *Id.* at 13. Following post-trial motions,
22 the Superior Court reduced the damage award to \$234,671. *Order Granting Remitter, et al.* 25;
23 *Amended Judgment on Verdict in Jury Trial.*

24 The Bartenwerfers filed a voluntary Chapter 7 petition on April 8, 2013. This adversary
25 proceeding followed.

26 **ANALYSIS**

27 I. THE JUDGMENT ON THE FAILURE-TO-DISCLOSE CLAIM CANNOT
28 SUPPORT A NONDISCHARGEABILITY COMPLAINT BECAUSE THERE
WAS NO FINDING OF ACTUAL KNOWLEDGE OR INTENT.

Buckley's complaint in this adversary proceeding alleges a single cause of action—exception
of his debt from the discharge under § 523(a)(2)(A) for alleged fraud. The jury in the State-Court

1 Action determined that the Bartenwerfers did not engage in fraud, and Buckley is precluded from
2 attacking that determination by the jury, preventing him from proving an essential element of his
3 § 523(a)(2)(A) claim. In his motion, Buckley admits that his entire adversary complaint is based
4 upon the jury's finding of nondisclosure of material facts. The jury's specific factual finding upon
5 which Buckley builds his entire nondischargeability complaint is as follows:

6 CACI VF 1910 - Seller Non-Disclosure of Material Facts

7 23. Did David Bartenwerfer or Kate Bartenwerfer know *or reasonably should have*
8 *known* of the water leaks, window conditions, status of permits and knew of the fire
escape issue before the property was transferred to Kieran Buckley?

9 *Verdict Form 9.* This finding does not square with the requirements of a finding of fraud under
10 § 523(a)(2)(A). Moreover, when reading the entire verdict, it is plain that that the jury found that the
11 Bartenwerfers did not make any knowing fraudulent statement—or nondisclosure—as required to
12 find a debt nondischargeable under § 523(a)(2)(A). Hence, the Court should deny Buckley's
13 summary judgment motion.

14 Under Ninth Circuit law, to except a debt from discharge under § 523(a)(2)(A), the creditor
15 must prove:

- 16 1. the debtor made representations that at the time the debtor knew to be false;
- 17 2. the debtor made those representations with the intention and purpose of deceiving the
18 creditor (scienter);
- 19 3. the creditor justifiably relied on those representations; and
- 20 4. the creditor sustained losses as a proximate result of the debtor's representations.

21 *Ghomeshi v. Sabban (In re Sabban)*, 600 F.3d 1219, 1222 (9th Cir. 2010); *Apte v. Romesh Japra,*
22 *M.D., F.A.C.C., Inc. (In re Apte)*, 96 F.3d 1319, 1322 (9th Cir. 1996); *Van Zandt v. Mbunda (In re*
23 *Mbunda)*, 484 B.R. 344, 350 (B.A.P. 9th Cir. 2012). Exceptions to discharge are construed strictly
24 against creditors and in favor of debtors. *Snoke v. Riso (In re Riso)*, 978 F.2d 1151, 1154 (9th
25 Cir.1992); *Klapp v. Landsman (In re Klapp)*, 706 F.2d 998, 999 (9th Cir.1983).

26 It is undisputed that the Court may apply issue preclusion in these proceedings provided that
27 the factual findings below are identical to the elements required to prove the nondischargeability
28 claim. *C.f. Grogan v. Garner*, 498 U.S. 279, 284 (1991) (bankruptcy court may apply issue

1 preclusion to those proven elements of state law claim that are identical to claim for
2 nondischargeability). The factual findings made in the state court must support the elements under
3 § 523(a)(2)(A) for the Court to apply issue preclusion:

4 Collateral estoppel applies in bankruptcy courts only if, *inter alia*, the first court has
5 made specific, subordinate, factual findings on the identical dischargeability issue in
6 question-that is, an issue which encompasses the same *prima facie* elements as the
bankruptcy issue-and the facts supporting the court's findings are discernible from
that court's record.

7 *Dennis v. Dennis (In re Dennis)*, 25 F.3d 274, 278 (5th Cir. 1994) (citing *Comer v. Comer (In re*
8 *Comer)*, 723 F.2d 737, 740 (9th Cir. 1984)). Here, the factual findings on the failure-to-disclose
9 claim do not match the elements required to prove a § 523(a)(2)(A) claim.

10 The jury's finding that the Bartenwerfers, as sellers of real property, did not disclose material
11 facts does not support a § 523(a)(2)(A) claim. The jury found that the Bartenwerfers "[knew] or
12 reasonably should have known" of certain facts. *Verdict Form 9*. This finding does not square with
13 the requirement under § 523(a)(2)(A) that the debtor making a knowingly false misrepresentation.
14 Relying in *Apte*, Buckley argues that the finding of nondisclosure is, in and of itself, sufficient to
15 support judgment under § 523(a)(2)(A). *Motion* at 7–8. While Buckley is correct that nondisclosure
16 of a material fact may underpin certain elements of a § 523(a)(2)(A) claim, the nondisclosure still
17 must be made *knowingly*. Tellingly, Buckley concedes that for the debt to be dischargeable, the
18 Bartenwerfers must have known the facts that were not disclosed. *Motion* at 7:18–24.

19 The knowingly requirement is made clear by a reading of the *Apte* decision itself. In *Apte*,
20 the debtor subleased certain office space to the creditor, but the debtor did not disclose that it was in
21 default under the master lease, that the landlord had commenced an unlawful detainer action against
22 the debtor, or that the master lease was subsequently terminated. 96 F.3d at 1320. The master lease
23 also required the debtor to obtain the landlord's consent for creditor's tenant improvements; debtor
24 did not obtain this consent and misrepresented this fact to the creditor. *Id.* After a hearing, the
25 bankruptcy court found that the debtor had made material misrepresentations with intent to deceive,
26 but found that the creditor's reliance on the misrepresentations was unreasonable and unjustifiable.
27 *Id.* Based upon these findings, the bankruptcy court found the debt dischargeable. *Id.*

28 The Ninth Circuit reversed the bankruptcy court's decision, noting that "nondisclosure of a

1 material fact in the face of a duty to disclose has been held to establish the requisite *reliance and*
2 *causation* for actual fraud under the Bankruptcy Code” *Id.* at 1323. The Ninth Circuit continued that
3 the debtor was the sole source of information to the creditor, the debtor had a duty to disclose the
4 information to the creditor, and had the information which was not disclosed. *Id.* at 1324. Because
5 the failure to disclose established reliance and causation, the Ninth Circuit found that the bankruptcy
6 court erred. *Id.*

7 The Court’s decision in *Mukherjee v. Sir (In re Sir)*, No. 07-05147, 2010 WL 2179177
8 (Bankr. N.D. Cal. May 25, 2010), does not support the conclusion offered by Buckley. In *Sir*, the
9 evidence before the court established that the Debtor knew of certain lawsuits that were not
10 disclosed, but there was no showing that existence of the suits was material to the transaction. 2010
11 WL 2179177 at *9–*10. In this case, there was no finding that the Bartenwerfers knew of the
12 defects, only that they should have known of certain defects.

13 What’s more, Buckley’s arguments the Superior Court’s resolution of post-judgment motions
14 misses the mark. While Buckley characterizes the Superior Court as finding fraud existed, passage
15 cited by Buckley as supporting this proposition only shows a finding that the jury’s verdict was
16 supported by the evidence. *Order Granting Remitter, et al.* 22:16–21. To support a judgment for
17 nondischargeability, the state court judgment must make specific factual findings as to the elements
18 of the § 523 claim. *See Harmon v. Korbin (In re Harmon)*, 250 F.3d 1240, 1247–1248 (9th Cir.
19 2001) (express factual findings required to give default judgment preclusive effect because it is
20 unclear if the state court considered and decided the issue); *see also Dennis*, 25 F.3d at 278.

21 While the jury’s verdict on the issue of nondisclosure may address the reliance and causation
22 elements of a § 523(a)(2)(A) claim, the verdict does not establish that the Bartenwerfers *knew* of the
23 facts that were not disclosed. The express finding by the jury was that the Bartenwerfers “knew or
24 *reasonably should have known*” of certain facts. *Verdict Form 9*. This does not meet the *knowingly*
25 standard under § 523(a)(2)(A). Moreover, when reading the jury verdict as a whole, it is plain that
26 the jury was convinced that the Bartenwerfers did not make a knowing misrepresentation—as
27 demonstrated by their express findings that the Bartenwerfers did not make a false misrepresentation
28 on the intentional misrepresentation claim and negligent misrepresentation claim, did not engage in

1 fraud, and awarded \$0 for intentional fraud.

2 While the standard of proof for punitive damages in state court is higher than the standard of
3 proof for discharge quality, the jury's refusal to award punitive damages is further indication of its
4 finding that the Bartenwerfers did not engage in knowingly fraudulent conduct. As previously
5 discussed, this conclusion is buttressed by the jury's findings that the Bartenwerfers did not make a
6 false misrepresentation and awarded \$0 for intentional fraud.

7 The Court should deny the motion.

8 II. BUCKLEY OVERSTATES HIS DAMAGES CLAIM.

9 Buckley asserts that, in the event the Court enters summary judgment in his favor—and it
10 should not—that his total amount of nondischargeable damages is \$209,670. As Buckley notes, the
11 nondisclosure question is limited to four issues: water leaks (damages of \$48,981), window
12 conditions (damages of \$20,000), status of permits (damages of \$14,888), and fire escape issues
13 (damages of \$5,076). Contrary to the assertion in Buckley's motion, the sum of these figures is
14 \$88,945. Assuming, without conceding, that the entire amount of the value/cost differential element
15 is nondischargeable, Buckley's damages cannot exceed \$178,945. The Court, however, should deny
16 the motion and award Buckley nothing.

17 III. BUCKLEY HAS NOT DEMONSTRATED THAT HE IS ENTITLED TO
18 ATTORNEYS' FEES AND COSTS.

19 Buckley has not established that he is entitled to recover his attorneys' fees, either in this
20 action or those incurred in the state-court proceedings. Buckley does not offer any evidence that the
21 contract between him and the Bartenwerfers authorized the recovery of attorneys' fees or that the
22 language of any such provision, if it exists, is broad enough to include tort damages. What's more,
23 this Court has not been asked to decide any contract claims which could serve as a basis for an
24 attorneys' fees award. The Court should deny the request for attorneys' fees.

25 IV. THE DECLARATION OF JANET BRAYER IS NOT RELEVANT TO THE
26 ISSUE BEFORE THE COURT AND SHOULD NOT BE CONSIDERED.

27 Buckley also offers the declaration of Janet Brayer in support of his motion for summary
28 judgment. The declaration is notable for what it does not do—it does not provide any evidence to
support Buckley's motion. All the declaration offers is a series of irrelevant and inflammatory

1 attacks on Mr. Bartenwerfer and Ms. Brayer's analysis of certain documents filed with the Superior
2 Court. The testimony proffered by the declaration is not relevant to the matter before the Court—
3 whether issue preclusion applies to support summary judgment—in that it does not have any
4 tendency to make a fact more or less probable than it would be without the testimony nor does it
5 relate to any facts of consequence. *See* Fed. R. Evid. 401; *see also Rutter Group Prac. Guide Fed.*
6 *Civ. Trials & Ev.* Ch. 8B-A at 8:110 *et seq.* (discussing standard). While the relevancy hurdle may
7 be low, the testimony offered in the Brayer Declaration has no bearing on the question before the
8 Court: the jury's factual findings in the proceedings before the Superior Court.

9 Even if the material is relevant, paragraphs 5 through 8 of the Brayer Declaration have little
10 probative value and are substantially outweighed by the unfair prejudice, confusing of issues, and
11 waste of time resulting from admission of the testimony. Fed. R. Evid. 403. These paragraphs make
12 various accusations regarding the conduct of discovery in the state court and contact between the
13 parties completely unrelated to the factual findings made by the jury. Hence, they have little
14 probative value. At the same time, these portions of the declaration result in unfair prejudice
15 because they are plainly an attempt to paint the defendants, distract the Court from the actual
16 findings by the jury, and waste time of the court because the matters discussed in these paragraphs
17 does not relate in any way to the resolution of the pending summary judgment motion.

18 For these reasons, the declaration of Janet Brayer should be excluded.

19 CONCLUSION

20 The jury was charged on the issue of misrepresentation of an important fact—the exact issue
21 presented by Buckley's § 523(a)(2)(A) claim—and resolved that question in favor of the
22 Bartenwerfers. The jury's finding that the Bartenwerfers "knew or reasonably should have known"
23 of certain facts that were not disclosed does not change that conclusion and cannot support a finding
24 on summary judgment that the Bartenwerfers knew of the facts that were not disclosed. Liability for
25 § 523(a)(2)(A) only arises upon a showing of a knowing misrepresentation or nondisclosure, and
26 reading the jury's verdict in total shows that the jury found no such knowing misrepresentation.
27 Additionally, Buckley overstates the damages that could be found nondischargeable, has not
28 demonstrated a right to recover attorneys' fees, and offers the inflammatory declaration of Janet

1 Brayer which offers nothing of value to these proceedings. Therefore, the Court should deny
2 Buckley's summary judgment motion.

3 DATED: May 21, 2015

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By: /s/ Matthew J. Olson

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